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Citation:

Sarah Hudson-Plush, Improving Educational Outcomes for Children in Foster Care: Reading the McKinney-Vento Act's Waiting Foster Care Placement Provision to include Children in Interim Foster Care Placements, 13 Cardozo J.L. & Gender 83 (2006)

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Thu Feb 7 21:41:05 2019

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# IMPROVING EDUCATIONAL OUTCOMES FOR CHILDREN IN FOSTER CARE: READING THE MCKINNEY-VENTO ACT'S “AWAITING FOSTER CARE PLACEMENT” PROVISION TO INCLUDE CHILDREN IN INTERIM FOSTER CARE PLACEMENTS

BY SARAH HUDSON-PLUSH\*

## INTRODUCTION

Eric and his sister Joanna were in foster care<sup>1</sup> for six years.<sup>2</sup> During those years, they experienced numerous foster care placements—some lasting for less than a month—in various neighborhoods.<sup>3</sup> Every time they moved to a new placement, they were taken out of school in the middle of the school year.<sup>4</sup> In some instances, they were not re-enrolled in their new schools for weeks or even months, and their records were not transferred from school to school.<sup>5</sup> Both Eric and Joanna have learning disabilities, and each time they went to a new school, the teachers did not know that they needed special education services.<sup>6</sup> Thus, over the years, Eric and Joanna missed months of school and received the services they needed only

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\* Candidate for J.D., Benjamin N. Cardozo School of Law, 2007; B.A., University of Michigan, 2001.

<sup>1</sup> Foster care means twenty-four hour substitute care for children placed away from their parents or guardians and for whom the State agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, childcare institutions, and preadoptive homes. 45 C.F.R. § 1355.20 (2006).

<sup>2</sup> ADVOCATES FOR CHILDREN, *PROJECT ACHIEVE: A MODEL PROJECT PROVIDING EDUCATION ADVOCACY FOR CHILDREN IN THE CHILD WELFARE SYSTEM* 31 (2005), available at <http://www.advocatesforchildren.org/pubs/ProjectAchievefinal.doc> [hereinafter ADVOCATES FOR CHILDREN]. Eric and Joanna's story is based on a true anecdote used in an Advocates For Children publication. Some facts have been changed. See *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* Note that this may be a violation of federal law. “[T]he new school in which the child enrolls shall take reasonable steps to promptly obtain the child’s records . . . from the previous school in which the child was enrolled . . . and the previous school in which the child was enrolled shall take reasonable steps to promptly respond to such request from the new school . . . .” 20 U.S.C. § 1414(d)(2)(C)(ii) (2000).

<sup>6</sup> See ADVOCATES FOR CHILDREN, *supra* note 2. This is potentially a violation of the Individuals with Disabilities Education Act’s “child find” provision, which states, “[a]ll children with disabilities residing in the State . . . are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.” 20 U.S.C. § 1412(a)(3)(A) (2000).

sporadically.<sup>7</sup> Upon their last move to a foster home in Queens, Eric's new high school refused to enroll him because he was sixteen years old and had no course credits toward graduation.<sup>8</sup> When Eric was finally enrolled, he was placed in ninth grade, for the third time, because his school records never transferred with him.<sup>9</sup>

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Unfortunately, the foster care system is replete with examples of foster children suffering poor educational outcomes.<sup>10</sup> However, some of these educational detriments can be minimized or eliminated if certain foster children are extended the protections of The McKinney-Vento Homeless Assistance Act<sup>11</sup> ("McKinney-Vento" or "the Act").

Congress passed McKinney-Vento to address the educational needs of *homeless* children and youth. The Act provides myriad protections for such children, such as free transportation to the school attended before becoming homeless<sup>12</sup> or immediate admission into the school in the new neighborhood, even in the absence of the usually required documentation.<sup>13</sup> In defining which children and youth qualify as homeless, the statute includes children and youth "awaiting foster care placement."<sup>14</sup> However, neither the statute nor the corresponding regulations define what it means to be "awaiting foster care placement."<sup>15</sup>

Part I of this Note provides background information and an overview of McKinney-Vento. Part II discusses the ambiguities of the "awaiting foster care placement" provision. It also critiques the non-regulatory guidance issued by the United States Department of Education to clarify the provision, arguing that this guidance is insufficient and inappropriate because it both relies on a definition of "foster care" provided by the United States Department of Health and Human

<sup>7</sup> See ADVOCATES FOR CHILDREN, *supra* note 2.

<sup>8</sup> *Id.* Since Eric has special education needs, this may be a violation of federal law, which requires that special needs students are guaranteed a "free appropriate public education." 20 U.S.C. § 1401(9) (2000).

<sup>9</sup> See ADVOCATES FOR CHILDREN, *supra* note 2. See also note 5.

<sup>10</sup> For further anecdotal examples of foster youth experiencing poor educational outcomes. See Ana España & Tracy Fried, *The Expanding Role of the Juvenile Court in Determining Educational Outcomes for Foster Children*, 5 J. CENTER FOR FAMS., CHILD. & CTS. 83, 83-84 (2004).

Jennifer M., a former foster youth who had more than twenty [foster care] placements, loved math but believed that her skills dropped the longer she stayed in the system. . . . Seventeen-year-old Ryan D. experienced multiple changes in placement while in foster care. He had attended more than six different high schools. While in his last group home, Ryan was told that he had earned only 12 credits toward graduation, yet 44 were required. [Though he would not graduate,] [w]ithin months he would turn 18 and be removed from his group home.

*Id.*

<sup>11</sup> See Pub. L. 107-110, 115 Stat. 1425 (2002) (codified as 42 USC §§ 11431-11435 (2005)).

<sup>12</sup> 42 U.S.C. § 11432(g)(4) (2005).

<sup>13</sup> *Id.* § 11432(g)(3)(C)(i).

<sup>14</sup> *Id.* § 11434a(2)(B)(i).

<sup>15</sup> Sara Woodward, *Advocates Seek Improvements in Education for Foster Youth*, 4 J. OF THE NAT'L CENTER FOR YOUTH L. 1, 2 (2004), available at [http://www.youthlaw.org/downloads/YLN\\_Education.pdf](http://www.youthlaw.org/downloads/YLN_Education.pdf) [hereinafter Woodward].

Services, and because it is non-binding. Part III discusses efforts by some state departments of education to develop their own interpretations of the “awaiting foster care placement” provision and to extend McKinney-Vento protections to foster children falling within the provision, as they interpret it. Part IV argues that the United States Department of Education should provide an interpretation of the “awaiting foster care placement” provision that will include children placed by public agencies in interim foster care placements<sup>16</sup>—and, thus, that children in interim placements should receive the protections of McKinney-Vento. The part begins by defining *interim* foster care placements. It then explains how the plain meaning of McKinney-Vento, and public policy, suggest that foster children in interim foster care placements should be considered “awaiting foster care placement.” Lastly, it details and rebuts some counter-arguments against this interpretation of the “awaiting foster care placement” provision.

#### I. BACKGROUND AND OVERVIEW OF MCKINNEY-VENTO

Approximately 1.35 million children experience homelessness each year;<sup>17</sup> however, until 1987, there was no federal law addressing the educational needs of homeless youth.<sup>18</sup> In that year, Congress enacted the Stewart B. McKinney Homeless Assistance Act,<sup>19</sup> with the goal of ensuring the enrollment, attendance, and success of homeless children and youth in school.<sup>20</sup> Congress amended and strengthened the McKinney Homeless Assistance Act in both 1990 and 1994.<sup>21</sup> The Act was then reauthorized by the No Child Left Behind Act of 2001<sup>22</sup> and renamed the McKinney-Vento Homeless Assistance Act.<sup>23</sup> Title VII-B of the McKinney-Vento Homeless Assistance Act addresses the educational needs of homeless children.<sup>24</sup>

McKinney-Vento was enacted pursuant to Congress’ Spending Power.<sup>25</sup> Under McKinney-Vento, grant money is given to states and then distributed to

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<sup>16</sup> The definition of interim foster care placement, as used in this Note, will be discussed *infra*, Part IV.

<sup>17</sup> AMERICAN BAR ASSOCIATION DAILY JOURNAL, Aug. 9-10, 2004, available at <http://www.abanet.org/leadership/2004/annual/dailyjournal/113.doc> [hereinafter ABA]. But see U.S. Department of Education, *McKinney-Vento Education For Homeless Children and Youth Program*, available at <http://www.ed.gov/print/programs/homeless/index.html> (last visited Aug. 14, 2006) (stating that each year over 800,000 children and youths in the United States experience homelessness) (emphasis added).

<sup>18</sup> Brad Colwell & Brian D. Schwartz, *Homeless and Alien Students: A Duty to Educate*, 165 ED. LAW REP. 447, 447 (2002).

<sup>19</sup> Pub. L. 100-77, 101 Stat 482 (1987) (codified at 42 USC §§ 11301-11407 (2005)).

<sup>20</sup> Frequently Asked Questions: McKinney-Vento Education For Homeless Children and Youth, [http://www.doe.state.in.us/alted/mckinney\\_vento\\_fa\\_q.html](http://www.doe.state.in.us/alted/mckinney_vento_fa_q.html) (last visited Aug. 14, 2006).

<sup>21</sup> Sheila O’Leary, *Educating Homeless Children*, 8 GEO J. ON POVERTY L. & POL’Y 513, 514 (2001).

<sup>22</sup> Pub. L. 107-110, 115 Stat. 1425 (2002) (codified as 20 U.S.C. §§ 6301 et seq.).

<sup>23</sup> Colwell & Schwartz, *supra* note 18, at 447. See *supra* note 11.

<sup>24</sup> ABA, *supra* note 17. See 42 U.S.C. §§ 11431-11435.

<sup>25</sup> Colwell & Schwartz, *supra* note 18, at 448.

local educational agencies.<sup>26</sup> Before becoming eligible for grant funding, states must submit an application to the United States Department of Education (“USDE”), outlining compliance with certain conditions.<sup>27</sup> Each state must establish an Office of the Coordinator of Education of Homeless Children and Youth, whose responsibility it is to gather and report statistical information on homelessness in the state and to coordinate services throughout the state.<sup>28</sup> Additionally, each state must submit a plan to the USDE, explaining how the state will meet the various mandates of McKinney-Vento.<sup>29</sup> After a state receives grant funds, it is required to distribute much of the money to local education agencies,<sup>30</sup> which apply for grants under the Act.<sup>31</sup> In 2005, 62.5 million dollars in McKinney-Vento funds was divided among the states to train school staff and

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 448. See 42 U.S.C. § 11432(g) (2005).

<sup>29</sup> Colwell & Schwartz, *supra* note 18, at 448. See 42 USC § 11432(g) (2005) (requiring contents of state plan).

<sup>30</sup> The term “local educational agency” refers to a public board of education or other public authority legally constituted within a state for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a state, or of or for a combination of school districts or counties that is recognized in a state as an administrative agency for its public elementary schools or secondary schools. 20 U.S.C. § 7801(26)(A) (2000). See 42 U.S.C. § 11434a(3) (2005) (“The term[] local educational agency . . . [has] the meaning given such terms in section 7801 of Title 20”).

<sup>31</sup> 42 U.S.C. § 11432(g) (2005). In accordance with the Tenth Amendment to the U.S. Constitution, McKinney-Vento cannot penalize states and local agencies that violate the Act. Colwell & Schwartz, *supra* note 18, at 450. See U.S. CONST. AMEND. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). The only power that the federal government has is to withhold grant funds to those states that do not comply with the requirements of McKinney-Vento. Colwell & Schwartz, *supra* note 18, at 450. Some jurisdictions, including the District of Columbia, have decided to opt out of receiving McKinney-Vento funding rather than to comply with its mandates. JoAnn Grozuczk Goedert, *The Education of Homeless Children: The McKinney Act and its Implications*, 140 ED. LAW REP. 9, 15-16 (discussing *Lampkin v. District of Columbia*, 879 F. Supp 116 (D.D.C. 1995)).

In 1993, a Washington, D.C. homeless advocacy group sued the District of Columbia on behalf of homeless parents and schoolchildren in the district for a series of violations of the McKinney Act. . . . [T]he United States Court of Appeals for the District of Columbia . . . ruled that parents of homeless children . . . have the right to bring a private cause of action to enforce [McKinney-Vento] . . . [O]nce a State accepts funds under the Act, it must ensure that the Act’s requirements are met . . . . On remand, the district court . . . granted [an] injunction command[ing] the District of Columbia to refer students for immediate school placement within 72 hours of a child’s arrival at a homeless shelter, and to provide daily public transit tokens to students, and accompanying adults, who were being housed more than 1.5 miles from school. . . . This victory, however, was short-lived. Within two months, the District of Columbia government informed the Court that the costs of meeting McKinney[-Vento] requirements so badly overwhelmed the federal financial support available through the Act that it would no longer participate in the McKinney grant program, and moved for dissolution of the injunction and dismissal of the case. The Court granted the motion, holding that the District had no affirmative obligation to meet the Act’s requirements if it did not receive federal homeless education funds . . . .

*Id.*

provide services for homeless youth.<sup>32</sup>

McKinney-Vento requires local school districts to take a variety of steps to protect children and youth who meet the Act's definition of "homeless." For example, McKinney-Vento permits homeless children, when feasible,<sup>33</sup> to attend their school of origin<sup>34</sup>—the school where they were last enrolled before becoming homeless, or where they attended when permanently housed.<sup>35</sup> Further, when the child wishes to attend her school of origin, McKinney-Vento requires school districts to provide transportation for the student to and from the school.<sup>36</sup> Students can stay in their school of origin the entire time they are homeless, and until the end of the year in which they move into permanent housing.<sup>37</sup> For those not wishing to attend their school of origin, but to attend the school in their new neighborhood, McKinney-Vento permits homeless students to enroll in any public school that other children living in the same area are eligible to attend.<sup>38</sup> The Act allows homeless children to enroll in schools immediately, even when they lack the usual required paperwork, such as medical and educational records and proof of residency.<sup>39</sup>

Additionally, McKinney-Vento requires school districts to designate a staff member to serve as liaison to assist homeless children.<sup>40</sup> The liaison ensures that homeless children are enrolled in school and that they have a full and equal opportunity to achieve in school.<sup>41</sup> McKinney-Vento also provides a process to resolve disputes regarding school placements, and requires that a district immediately enroll a homeless student in the school of her choice pending resolution of the dispute.<sup>42</sup>

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<sup>32</sup> See Stacy A. Teicher, *For Homeless, No Place Like School*, CHRISTIAN SCIENCE MONITOR (Feb. 2005).

<sup>33</sup> The U.S. Department of Education issued guidance on how to interpret McKinney-Vento in March of 2003. The guidance states that feasibility "should be a student-centered, individualized determination," considering such factors as: "the age of the child or youth; the distance of a commute and the impact it may have on [the] student's education; personal safety issues; a student's need for special instruction . . . ; the length of anticipated stay in temporary shelter or other temporary location; and the time remaining in the school year." Patricia Julianelle, *Educating Homeless Students Under the Reauthorized McKinney-Vento Act* (Apr. 2004), at [http://www.nsba.org/site/doc\\_cosa.asp?TrackID=&SID=1&DID=33536&CID=164&VID=50](http://www.nsba.org/site/doc_cosa.asp?TrackID=&SID=1&DID=33536&CID=164&VID=50) (citing U.S. Dep't of Educ. Education for Homeless Children and Youth Program (Mar. 2003) at 12) (last visited Aug. 14, 2006).

<sup>34</sup> 42 U.S.C. § 11432(g)(3)(B)(i) (2005).

<sup>35</sup> *Id.* § 11432 (g)(3)(G).

<sup>36</sup> *Id.* § 11432(g)(4).

<sup>37</sup> McKinney-Vento 2001 Reauthorization—At a Glance, <http://www.serve.org/nche/downloads/briefs/reauthorization.pdf#search=%22McKinney-Vento%202001%20Reauthorization%E2%80%94At%20a%20Glance%22> (last visited Oct. 1, 2006). See 42 U.S.C. § 11432(g)(3)(A)(i)(I-II) (2005).

<sup>38</sup> 42 U.S.C. § 11432 (g)(3)(G) (2005).

<sup>39</sup> 42 U.S.C. § 11432(g)(3)(C)(i) (2005).

<sup>40</sup> *Id.* § 11432(g)(6).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* § 11432(g)(3)(E).

The Act provides a definition for “homeless children and youths.” This definition lays out the requirements for which children may benefit from McKinney-Vento’s protections and which children may not. McKinney-Vento defines “homeless children and youths” as follows:

- (2) The term “homeless children and youths”—
- (A) means individuals who lack a fixed, regular, and adequate nighttime residence...; and
- (B) includes—
- (i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are *awaiting foster care placement*...<sup>43</sup>

Hence, included within the definition of “homeless children and youths” are some foster youth, namely those who are “awaiting foster care placement.”<sup>44</sup>

While the Act counts children “awaiting foster care placement” as homeless, McKinney-Vento does not define that phrase. Further, there are no binding regulations to offer guidance concerning its proper interpretation. While there is some case law interpreting McKinney-Vento,<sup>45</sup> there is no case law interpreting the “awaiting foster care placement” provision, which was added to the Act during the 2001 reauthorization.<sup>46</sup>

## II. THE “AWAITING FOSTER CARE PLACEMENT” PROVISION AND THE UNITED STATES DEPARTMENT OF EDUCATION’S INAPPROPRIATE AND INSUFFICIENT GUIDANCE ON HOW TO INTERPRET IT

Although McKinney-Vento protects youth who are “awaiting foster care placement,” the Act does not define that phrase.<sup>47</sup> In fact, the law and corresponding regulations provide no additional guidance to explain exactly which youth the phrase “awaiting foster care placement” includes.<sup>48</sup> However, the USDE

<sup>43</sup> *Id.* § 11434a(2)(A)(B)(i-iv) (emphasis added).

<sup>44</sup> *Id.* § 11434a(2)(B)(i).

<sup>45</sup> See, e.g., National Law Center on Homelessness and Poverty v. State of New York, 2004 WL 2375590 (E.D.N.Y. Oct. 23, 2004), Harrison v. Sobel, 705 F. Supp. 870, (S.D.N.Y. 1988), Arroyo *ex rel* Orozco v. Sobel, 674 F. Supp. 125 (S.D.N.Y. 1987), Frez-Albrecht v. Avon Board of Education, Case #03-49 (August 31, 2004), Salazar v. Edwards, No. 92 CH 5703 (Ill. Cir. Ct. Cook County Aug. 3, 1999).

<sup>46</sup> McKinney-Vento 2001 Reauthorization—At a Glance, *supra* note 37.

<sup>47</sup> National Law Center on Homelessness & Poverty, “*Awaiting Foster Care Placement*” under the McKinney-Vento Act 3, at <http://www.k12.wa.us/HomelessEd/pubdocs/PolicyBrief.doc> (last visited Aug. 14, 2006) [hereinafter NLCHP].

<sup>48</sup> Woodward, *supra* note 15, at 2. See also ABA, *supra* note 17 (“The U.S. Department of Education has not issued sufficient guidance to assist states and school districts in applying the McKinney-Vento Act to children and youth awaiting foster care placement.”).

has issued two forms<sup>49</sup> of *non-regulatory*,<sup>50</sup> and thus non-binding, guidance that shed light on the “awaiting foster care placement” provision.

The first such guidance was a July 2003 e-mail sent from the USDE to the state coordinators of homeless education, in an attempt to clarify the “awaiting foster care placement” provision.<sup>51</sup> The second form of guidance, issued a year later in July 2004, was a published “non-regulatory guidance for the McKinney-Vento program,”<sup>52</sup> which addressed various aspects of McKinney-Vento, including the “awaiting foster care placement” provision. An examination of these two pieces of non-regulatory guidance reveals that 1) the USDE’s interpretation of foster care as applied to McKinney-Vento is inappropriate, and 2) the USDE’s recommendation that school employees collaborate with other agencies to determine which children qualify as “awaiting foster care placement” is insufficient because it is merely advisory.

#### A. *The USDE’s Interpretation of “Foster Care” Is Inappropriate*

In its July 2003 e-mail to the McKinney-Vento state coordinators, the USDE explained that in interpreting the phrase “awaiting foster care placement,” the USDE was guided by the definition of “foster care” in 45 C.F.R. § 1355.20,<sup>53</sup> a regulation promulgated by the United States Department of Health and Human Services (“USDHHS”).<sup>54</sup> The USDE adopted the USDHHS’ definition of “foster care” in consultation with the USDHHS and its recommendation that the USDE not create an alternate policy; in other words, as a governmental agency, the USDE did not wish to posit a definition of “foster care” inconsistent with the

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<sup>49</sup> There are actually three forms of guidance if one counts a March 2003 non-regulatory guidance, which was replaced by the July 2004 non-regulatory guidance.

<sup>50</sup> Regulations have the force of law, whereas non-regulatory guidance does not. *See, e.g.,* Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 465 (1999) (“[A]n agency’s interpretive regulations not promulgated pursuant to express statutory authority should be accorded less weight than administrative regulations which Congress has declared shall have the force of law. . . .”) (internal quotations omitted).

<sup>51</sup> E-mail from Gary Rutkin, USDE Federal Program Manager for the Title I, Part D Neglected, Delinquent, or At Risk Program and Manager of the McKinney-Vento Education for Homeless Children and Youth Program (July 22, 2003 3:19 PM) (on file with the author) [hereinafter USDE E-mail]. *See also* NCHE, *State Coordinators for Homeless Education*, at [http://www.serve.org/nche/states/state\\_resources.php](http://www.serve.org/nche/states/state_resources.php) (last visited Aug. 14, 2006) (“Every state is required by federal law to have a State Coordinator for Homeless Education. This person is responsible for ensuring the understanding of and compliance with [] McKinney-Vento . . . in public schools throughout the state.”).

<sup>52</sup> Education For Homeless Children and Youth Program, Title VII-B of the McKinney-Vento Homeless Assistance Act, As Amended by the No Child Left Behind Act of 2001: Non-Regulatory Guidance at 18 (July 2004), available at <http://www.ed.gov/programs/homeless/guidance.pdf>.

<sup>53</sup> 45 C.F.R. § 1355.20 (2005).

<sup>54</sup> USDE E-mail, *supra* note 51. *See also* HHS: What We Do, a <http://www.hhs.gov/about/whatwedo.html/> (last visited Aug. 14, 2006) (“The Department of Health and Human Services is the United States government’s principal agency for protecting the health of all Americans and providing essential human services, especially for those who are least able to help themselves.”).



USDHHS'.<sup>55</sup> The USDHHS regulation defines foster care as follows:<sup>56</sup>

Foster care means 24-hour substitute care for children placed away from their parents or guardians and for whom the State agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and pre-adoptive homes....<sup>57</sup>

There is a head-on collision between the USDHHS' definition of foster care and a definition that would be appropriate under McKinney-Vento.<sup>58</sup> Applying the USDHHS' definition of "foster care" to McKinney-Vento renders the "awaiting foster care placement" provision meaningless.<sup>59</sup> This is because when applied to McKinney-Vento, the USDHSS' definition of "foster care" is so far-reaching that a child is considered *in* foster care—as opposed to *awaiting* foster care placement—as soon as the child is removed from her home and placed in *any* out-of-home placement.<sup>60</sup> If the USDHHS' definition of foster care is used, it is unlikely that any children can benefit from McKinney-Vento's protections through the "awaiting foster care placement" provision.<sup>61</sup>

Naturally, agencies must interpret statutory terms in such a way as to meet the purpose and intent of the legislation.<sup>62</sup> The USDHHS issued 45 C.F.R. § 1355.20 to define "foster care" as the term is used in the Adoption and Safe Families Act of 1997 ("ASFA").<sup>63</sup> The USDHHS enacted a broad definition of foster care in an effort to cast a wide net within the ASFA—to extend statutory and regulatory protections to as many children as appropriate.<sup>64</sup> The USDHHS' regulations are designed to protect the physical, mental and emotional health and safety of children in state custody.<sup>65</sup> Many provisions of the regulations apply only

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<sup>55</sup> E-mail from Gary Rutkin, USDE Federal Program Manager for the Title I, Part D Neglected, Delinquent, or At Risk Program and Manager of the McKinney-Vento Education for Homeless Children and Youth Program, (Oct. 5, 2005 4:05:34) (on file with author).

<sup>56</sup> USDE E-mail, *supra* note 51.

<sup>57</sup> *Id.* See 45 C.F.R. § 1355.20a.

<sup>58</sup> E-mail from Patricia Julianelle, Pro Bono Counsel for the National Association for the Education of Homeless Children and Youth (Oct. 9, 2005 5:38) (on file with author).

<sup>59</sup> Woodward, *supra* note 15, at 2.

<sup>60</sup> *Id.* 45 C.F.R. § 1355.20 defines "foster care" broadly, stating that any child in a foster family home, foster home of relative, group home, emergency shelter, residential facility, child care institution, or preadoptive home is *in* foster care. Under McKinney-Vento, children *in* foster care cannot benefit from the Act's protections. Rather, the protections of McKinney-Vento apply only to children *awaiting* foster care placement.

<sup>61</sup> Using the USDHHS' definition of "foster care," perhaps a child could be considered awaiting foster care placement while she is being driven from her family's home to be placed in foster care. However, it is ludicrous to suggest that Congress only intended children to be awaiting foster care placement during this tiny window of time.

<sup>62</sup> Woodward, *supra* note 15, at 2.

<sup>63</sup> Pub.L. 105-89, Nov. 19, 1997, 111 Stat. 2115 (codified as 42 U.S.C. §§ 673b, 679b & 678 (2005)).

<sup>64</sup> NLCHP, *supra* note 47, at 2.

<sup>65</sup> *Id.*

to children in foster care; therefore, the regulations define “foster” care broadly.<sup>66</sup>

The USDHHS defines foster care broadly to extend the protections of the ASFA to as many children as possible.<sup>67</sup> However, using that broad definition of foster care in the context of McKinney-Vento actually *narrows* the coverage of McKinney-Vento. This weakens the USDE’s primary goal of improving academic achievement<sup>68</sup> and renders the “awaiting foster care placement” provision meaningless.<sup>69</sup>

Indeed, the USDE has recognized that the USDHHS’ definition of “foster care” is inappropriate when applied to McKinney-Vento. A short time after e-mailing the McKinney-Vento state coordinators in July 2003, the USDE e-mailed them again, this time in response to the concern that the USDHHS’ regulations rendered the “awaiting foster care placement” meaningless.<sup>70</sup> The USDE stated, “Obviously we have incompatible language with legislations designed to protect and serve at-risk children.”<sup>71</sup> To compensate for this discrepancy, the second USDE e-mail states that school officials should be *guided* by the USDHHS’ definition of “foster care;”<sup>72</sup> however, the e-mail also gives school officials discretion to collaborate with other agencies in order to determine whether individual children are “awaiting foster care placement.”<sup>73</sup> However, as stated before, this guidance is non-binding and therefore insufficient.

*B. The USDE’s Recommendations Concerning Inter-Agency Collaboration Are Insufficient Because They Are Merely Advisory*

Both the July 2003 e-mail and the July 2004 non-regulatory guidance encouraged school officials to use their discretion in determining whether a child or youth is “homeless” under McKinney-Vento because she is “awaiting foster care

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<sup>66</sup> For example, the following regulatory protections apply to children in foster care: permanency hearings (45 C.F.R. § 1355.34(c)(2)(iii) (2006)); on-site reviews of child and family services by federal and state reviewers (45 C.F.R. § 1355.33(c)(1) (2006)); and requirement for reasonable efforts to return children home or place them in permanent placements (45 C.F.R. § 1355.34(b)(2)(ii)(G) (2006)). NLCHP, *supra* note 47, at 2 (footnote 4).

<sup>67</sup> NLCHP, *supra* note 47, at 2.

<sup>68</sup> *Id.* at 2-3.

<sup>69</sup> Note that there is no requirement that the USDE use the same definition of “foster care” as the USDHHS. Different agencies, or even different branches of the same agency, often define terms differently. For example, various federal agencies define the term “homeless” quite differently. Even within the USDE, terms such as “parent” and “free appropriate public education” have different definitions in different contexts. NLCHP, *supra* note 47, at 2.

<sup>70</sup> E-mail from Gary Rutkin, USDE Federal Program Manager for the Title I, Part D Neglected, Delinquent, or At Risk Program and Manager of the McKinney-Vento Education for Homeless Children and Youth Program (July 23, 2003, 16:33:00 EST) (on file with author) [hereinafter “USDE e-mail II”].

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* The July 2003 e-mail contradicts itself, as it advises school districts to adopt the meaning of foster care as defined by 45 C.F.R. § 1355.20, while at the same time suggesting that school officials should have discretion in determining which youths fit the definition of “awaiting foster care placement.”

placement.” The e-mail stated that in determining whether a child is “awaiting foster care placement,” local school officials should consult with their district liaison for homeless children and youth as well as their local public social service agency providers.<sup>74</sup> Similarly, the July 2004 non-regulatory guidance stated that local education agency liaisons “should confer and coordinate with local public social service agency providers in determining how best to assist homeless children and youth who are awaiting foster care placement.”<sup>75</sup>

Advocates for the educational rights of foster youth may applaud the fact that the USDE offers school officials discretion in deciding who is “awaiting foster care placement,” since school officials are seemingly not restricted by any one interpretation of the phrase. However, the guidance is non-binding, allowing state and local education to read “awaiting foster care placement” narrowly. Thus, school officials in some districts may choose to deny McKinney-Vento protection to children who could potentially fit within the definition of “awaiting foster care placement.” After all, serving a child under McKinney-Vento requires both time and money. Hence, the USDE’s guidance is insufficient because it does not require the states to serve children who could fit within the definition of “awaiting foster care placement.” Since school districts do not know what the provision means, they cannot be held accountable for not serving children who may fall within it.

### III. State Efforts to Extend McKinney-Vento Protections to Some Foster Youth

It is critical that the USDE provides a definition of “awaiting foster care placement” so that all school officials know which children should be served under this provision of McKinney-Vento. However, some state departments of education are already providing McKinney-Vento protections to certain foster children. When such states serve children under the “awaiting foster care placement” provision they are forced—in the absence of any binding federal interpretation—to develop their

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<sup>74</sup> USDE e-mail II, *supra* note 70.

For McKinney-Vento purposes, which means for purposes of serving the needs of a child who fits the definition of homeless children and youth, liaisons can be guided by the [USD]HHS regulatory definitions, however, they can still collaborate with social services to jointly advocate for educational services that support[ ] the educational needs of an individual student in a given temporary living situation. For example, both parties may reach an agreement to serve a student under McKinney-Vento while in a short-term emergency placement in order to maintain a stable school setting (e.g., school of origin). It is, therefore, essential to establish collaborative relationships to help define how language that supports children eligible for McKinney-Vento (awaiting foster care placement) can be used to help them receive those services, even when there are competing regulations. We believe circumstances will naturally come about that we cannot anticipate that will call for flexibility in interpreting how statutory language is applied to serve the best needs of homeless students. As State Coordinators you are in the best position to recommend and guide liaisons in understanding how to be flexible in supporting students, while understanding compatible and competing statutory requirements.

*Id.*

<sup>75</sup> Non-Regulatory Guidance, *supra* note 52, at 20.

own interpretation of what it means to be “awaiting foster care placement.” Below, the separate interpretations of “awaiting foster care placement” developed by three states—Connecticut, Massachusetts, and Tennessee—are considered.

#### A. Connecticut

In February of 2005, the Connecticut commissioners of the Department of Children and Families (“DCF”) and the Department of Education sent an e-mail to many stakeholders, including all Connecticut school superintendents and all DCF staff.<sup>76</sup> The e-mail first explained that all foster children in DCF custody who are placed in “emergency or transitional shelter placements” are entitled to, and will be afforded, the protections provided by McKinney-Vento.<sup>77</sup>

Attached to the e-mail was a list of DCF placements that fall under the rubric of “emergency or transitional shelter placement.”<sup>78</sup> The list included shelters, SAFE Homes,<sup>79</sup> and Permanency Diagnostic Centers.<sup>80</sup> These three types of placements have in common the fact that they are all intended to be short-term placements lasting only until a longer-term foster care placement can be arranged. For example, a child placed in a shelter will be removed once a different foster placement opens. Likewise, a child is only intended to stay in a SAFE Home for an average of thirty days, and no more than forty-five days, while a more long-term placement can be arranged for her.<sup>81</sup> Similarly, a child remains in a Permanency Diagnostic Center only until her needs can be evaluated and she can be placed in

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<sup>76</sup> Letter from the Connecticut Commissioners of Education and Social Services to various stakeholders (Feb. 15, 2005), available at <http://www.abanet.org/child/rc/education/mckinneyventoactfinal021505.doc> (last visited Aug. 14, 2006).

<sup>77</sup> *Id.* An argument can be made that Connecticut is actually employing the “children and youth . . . living in emergency or transitional shelters” provision of McKinney-Vento when providing the Act’s protections to such children.

<sup>78</sup> *Id.*

<sup>79</sup> “The Department of Children and Families believes that, whenever possible, children should grow and develop in the most family like, least restrictive setting possible. The purpose of a SAFE Home is to provide a safe and stable environment for children who experience out-of-home placement for the first time. SAFE Homes will provide services and assist in timely planning for permanency, including determinations regarding reunification or adoption. SAFE Homes should facilitate keeping sibling groups together, provide the opportunity for children to remain in close proximity to their own communities and allow children to attend their own schools. Children who are removed from their homes due to abuse or neglect are often traumatized by the rapid removal from familiar surroundings as well as by the damaging behavior of their parents or guardians. These children require an initial placement in which they will feel as secure and stable as possible. If children cannot be returned home, another permanency plan should be achieved as quickly as possible. Further, multiple placements should be avoided to reduce disruptions in a child’s life.” Department of Children and Families, Policy Manual: Treatment Options for Placements (36-52-2: SAFE Homes), available at <http://www.dir.ct.gov/dcf/Policy/trmt36/36-52-2.htm> (last visited Oct. 1, 2006).

<sup>80</sup> A child is taken to a Permanency Evaluation Center for the sole purpose of evaluating him or her to determine which type of foster care placement is appropriate—i.e., to determine whether the child’s psychological needs require him or her to be placed in a certain type of placement.

<sup>81</sup> Department of Children and Families, Policy Manual: Treatment Options for Placements *supra* note 79.

another foster care placement.

The e-mail also stated that children who are placed on an emergency basis in a transitional foster home with a plan of being moved within thirty days to a more permanent foster or adoptive home may be considered covered by McKinney-Vento on a case-by-case basis.<sup>82</sup> The commissioners of the departments also agreed to consider applying McKinney-Vento on a case-by-case basis to children who have experienced more than three placements in a twelve-month period,<sup>83</sup> even if those placements were not originally intended to be very short term.

#### B. Massachusetts

In January of 2004, the Massachusetts Department of Education and Department of Social Services (“DSS”) sent a joint letter<sup>84</sup> to the USDE explaining their interpretation of “awaiting foster care placement.”<sup>85</sup> The two state departments agreed, “children and youth in the state’s care or custody who are living in ‘emergency, temporary or transitional’ housing are homeless as defined by the McKinney-Vento Homeless Assistance Act.”<sup>86</sup> Massachusetts determined that the following placements are “emergency, temporary or transitional”: shelters, Hotline Homes,<sup>87</sup> Bridge Homes,<sup>88</sup> and diagnostic placements.

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

In accordance with McKinney-Vento . . . the local education agency [ ], in collaboration with DCF, will ensure that all children in DCF custody who are placed in one of these institutions, or otherwise fall under the scope of [ ] McKinney-Vento, can continue to attend their school of origin, if that is in their best interests. . . . This protection remains in effect for the duration of the child’s placement in that emergency or transitional placement setting or for the remainder of the academic year if the child is subsequently placed in a foster home or other placement setting during an academic year. . . . In addition to the right to attend the school of origin, there are further protections provided by McKinney-Vento that must be afforded to children in DCF custody who are placed in one of the listed emergency or transitional placement settings or are otherwise deemed eligible on a case-by-case basis. These include, but are not limited to, the right to immediate enrollment even if necessary enrollment records are not immediately available.

*Id.*

<sup>84</sup> Letter from the Mass. Commissioners of Education and Social Services to Gary Rutkin (Jan., 30, 2004), on file with author [hereinafter “Mass. Letter”]

We believe that the agreements reached between our agencies regarding the above-described living situations are consistent with your advice to local school officials and social service agencies to work collaboratively to ‘advocate for educational services that support[ ] the educational needs of an individual student in a given temporary living situation.’

*Id.*

<sup>85</sup> Woodward, *supra* note 15, at 4.

<sup>86</sup> *Id.*

<sup>87</sup> Hotline Homes provide emergency care of up to seventy-two hours while the Department of Social Services tries to find a foster home for the child. Natalie White, *DSS Makes Plea for More Foster Homes*, available at <http://www.southcoastoday.com/daily/10-97/10-30-97/b01lo040.htm> (last visited Aug. 14, 2006).

<sup>88</sup> A Bridge Home is a temporary group home for children in the legal custody of the DSS. The

All of these placements are meant to be very temporary, relative to other foster care placements. As mentioned above, a child is placed in a shelter only on an emergency basis and will be removed once a different placement becomes available. Similarly, a child is intended to remain in a Hotline Home for only seventy-two hours while DSS tries to find her a foster home.<sup>89</sup> A child stays in a Bridge Home for up to forty-five days, after which time she is placed in a longer-term foster care placement or returned to her parents.<sup>90</sup> Likewise, a child is expected to reside in a diagnostic center only until he is evaluated to determine an appropriate longer-term placement.

In addition, Massachusetts recognized that there might be occasions in which a placement that is not very temporary, by definition, would still be considered “emergency, temporary or transitional.”<sup>91</sup> The e-mail stated that there could be a circumstance in which, due to limited resources, the DSS places a child in a foster home, with the intention of removing that child from that placement as soon as another placement is free.<sup>92</sup> In such a case, that child could also be considered to be “awaiting foster care placement.”<sup>93</sup>

### C. Tennessee

In a 2003 policy memorandum, the State of Tennessee Department of Children’s Services explained which foster children are covered by McKinney-Vento.<sup>94</sup> The memo stated that children falling within McKinney-Vento include those in interim or short-term placements, such as assessment beds, emergency shelters or foster homes that are anticipated or likely to be short-term in nature, including situations where it is anticipated that a child coming into custody will leave custody relatively quickly.

## IV. FOSTER CHILDREN IN INTERIM PLACEMENTS SHOULD BE CONSIDERED

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purpose of the Bridge Home is to stabilize the child’s situation and, while doing so, to maintain supports within the child’s home community. The length of stay in a Bridge Home is up to forty-five days. During this time, DSS assesses the needs of the child and attempts to provide a stabilizing atmosphere so that the child may return home at the conclusion of the forty-five-day assessment period. According to DSS, approximately forty percent of children placed in Bridge Homes state-wide are ultimately returned to their parents. DSS places those children who cannot return home with kin, in foster care, or in another placement setting appropriate to the child’s needs. David Driscoll and Jeffrey A. Locke, (Memorandum) *School Enrollment of Children in DSS Custody Residing in Bridge Homes* (1999), available at <http://www.doe.mass.edu/mailings/1999/cm081799.pdf>.

<sup>89</sup> *Supra* note 87.

<sup>90</sup> *Supra* note 88.

<sup>91</sup> Mass. Letter, *supra* note 84.

<sup>92</sup> *Id.*

<sup>93</sup> In response to Massachusetts’s letter, the USDE approved its approach and, in March 2004, the Massachusetts departments implemented their interpretation of the “awaiting foster care placement” provision. Woodward, *supra* note 15, at 4.

<sup>94</sup> State of Tennessee Department of Children’s Services, *Administrative Policies and Procedures: 21.14* (Effective May 5, 2003), available at <http://www.state.tn.us/youth/policies/Chapter%2021%20Education/21-14%20Serving%20the%20Educational%20Needs%20of%20the%20Child-Youth%20in%20.pdf>.

“AWAITING FOSTER CARE PLACEMENT” UNDER MCKINNEY-VENTO

As discussed above, some states have developed their own interpretations of how to define who is “awaiting foster care placement.” However, *all* states should be working to ensure that children awaiting foster care placement are being served under McKinney-Vento. In the absence of a federal mandate, many states are unlikely to take steps to define awaiting foster care placement and then to identify and serve children meeting the definition. Hence, a federal regulation providing an interpretation of “awaiting foster care placement” is essential. The USDE should issue a regulation requiring that children in *interim* foster care placements be considered “awaiting foster care placement” for McKinney-Vento purposes. The plain meaning of McKinney-Vento and public policy concerns suggest that such an interpretation is appropriate.

*A. What Is an Interim Foster Care Placement and How Is a Determination Made That a Child Is in an Interim Foster Care Placement?*

Once a child enters foster care,<sup>95</sup> she remains there until a permanent living arrangement can be found.<sup>96</sup> Children reside in a wide spectrum of foster care placements<sup>97</sup> while they await permanency. While all foster care placements are,

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<sup>95</sup> Children are placed in foster homes because they have been removed from their own families due to abuse, neglect, or other family problems that endanger their safety. Adoption.com, Foster Parenting and Adoption, <http://library.adoption.com/Foster-Parenting-and-Adoption/Foster-Care-and-Adoption-for-Waiting-Children/article/45/1.html> (last visited Aug. 14, 2006). Additionally, a child may need foster care because the child’s parent or legal guardian has died, is in jail, abandoned the child, has an alcohol or drug abuse problem, or due to physical or mental illness, is unable to care for the child. Foster Care—Frequently Asked Questions, [http://www1.dshs.wa.gov/ca/services/srvFostFAQ.asp#What\\_is\\_Foster\\_Care](http://www1.dshs.wa.gov/ca/services/srvFostFAQ.asp#What_is_Foster_Care) (last visited Aug. 14, 2006). A child may also be placed in foster care voluntarily, at the request of his or her parents or legal guardian. New York City Family Court—Foster Care Approval & Review, [http://www.nycourts.gov/courts/nyc/family/faqs\\_fostercare.shtml](http://www.nycourts.gov/courts/nyc/family/faqs_fostercare.shtml) (last visited Aug. 14, 2006).

<sup>96</sup> The definition of permanency is a safe, consistent, nurturing, permanent home in which a child can grow to adulthood. The Adoption and Safe Families Act, *available at* <http://www.nysccc.org/linkfamily/Projectplans/spring04gathering/CASA%20ASFA.htm> (last visited Aug. 14, 2006). Under ASFA, a permanency hearing must be held for each child in foster care within twelve months of placement of the child. The goal of the permanency hearing is to insure that a Permanency plan will be in place for the child. The Permanency plan must consider five choices for the termination of a child’s stay in foster care: 1) the child will be returned to the parent; 2) the child will be placed for adoption and a termination of parental rights petition is filed; 3) the child will be referred for legal guardianship; 4) the child will be permanently placed with a fit and willing relative; or 5) the child will be placed in another planned permanent living arrangement if a compelling reason has been documented so that the court can determine that it would not be in the child’s best interest to be placed according to the prior four alternatives. *Id.* See 42 U.S.C. § 675(5)(C) (2005). Naturally, once a child has achieved permanency in her living situation, she would no longer qualify for McKinney-Vento’s protections because she is not “awaiting foster care placement.”

<sup>97</sup> According to 2003 estimates, the placement settings of the 523,000 children in foster care that year were as follows: foster family home (relative): 23%; foster family home (non-relative): 46%; group home: 9%; institution: 10%; supervised independent living: 1%; runaway: 2%; trial home visit: 4%; and pre-adoptive home: 5%. These are preliminary estimates as of fiscal year 2003, 10/1/02 through 9/30/03. AFCARS Report—Current Estimates as of Aug. 2005, *available at* <http://www.acf.hhs.gov/programs/cb/publications/afcars/report10.htm> (last visited Aug. 14, 2006). For descriptions of various foster care placements, see Adoption.com, Group Home,

by definition, temporary, certain types of foster care placements are intended to be “short-term” while other types of placements are intended to be “long-term.” For purposes of this Note, short-term placements will be referred to as *interim* foster care placements.<sup>98</sup> Whether a child’s placement is intended to be long-term or *interim* depends on the specific situation of the child and the placements that are available when the child enters foster care.<sup>99</sup>

### 1. Long-Term Placements v. Interim Placements

While it is not always easy to distinguish between long-term placements and *interim* placements, the two are distinct. Long-term placements are intended as appropriate placements for a child to await permanency.<sup>100</sup> For example, the

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<http://glossary.adoption.com/group-home.html> (last visited Aug. 14, 2006) (“A group home is an alternative to traditional in-home foster care for children, in which children are housed in an intimate or home-like setting, in which a number of unrelated children live for varying periods of time with a single set of house parents, or with a rotating staff of trained caregivers. More specialized therapeutic or treatment group homes have specially-trained staff to assist children with emotional and behavioral difficulties. The make-up and staffing of the group home can be adapted to meet the unique needs of its residents.”); Adoption.com, Independent Living, <http://glossary.adoption.com/independent-living.html> (last visited Aug. 14, 2006) (“Independent Living is a type of foster care placement that helps provide life-skills training to older children, to assist them to acquire the skills they will need to live independently as adults. These types of programs are designed for children who are ‘aging out’ of foster care, as they near majority, and for whom there is no other plan for permanent adoption placement.”); Administration for Children & Families, [http://www.acf.hhs.gov/programs/cb/laws/cwpm/policy\\_dsp.jsp?citID=150#553](http://www.acf.hhs.gov/programs/cb/laws/cwpm/policy_dsp.jsp?citID=150#553) (last visited Aug. 14, 2006) (“A Trial Home Visit occurs when the child has been in a foster care placement, but, under continuing State agency supervision, is then returned to the principal caretaker for a limited and specified period of time. If a time period is not specified the child should be identified as having been returned home at the point at which the trial home visit exceeds six months.”); Child Welfare Policy Manual, [http://www.acf.hhs.gov/programs/cb/laws/cwpm/policy\\_dsp.jsp?citID=150#553](http://www.acf.hhs.gov/programs/cb/laws/cwpm/policy_dsp.jsp?citID=150#553) (last visited Aug. 14, 2006) (“A Pre-Adoptive Home is a home in which the family has been approved to adopt the child. The family may or may not be receiving a foster care payment or an adoption subsidy on behalf of the child. The child is considered in foster care until the adoption has been finalized, that is, a judge has signed the adoption decree.”)

<sup>98</sup> Organizations, including the American Bar Association and the National Center on Homelessness & Poverty, have taken the position that children in interim foster care placements should be included in the “awaiting foster care placement” provision and, thus, protected under McKinney-Vento. See ABA, *supra* note 17 (discussing the American Bar Association’s interpretation of the “awaiting foster care placement” provision, stating,

the American Bar Association urges the United States Department of Education to provide an interpretation of ‘awaiting foster care placement’ under Subtitle VII-B of the McKinney-Vento Act . . . that will include children and youth placed by public agencies in interim, emergency, or short-term placements to assure such children and youth in temporary out-of-home settings have uninterrupted educational access.);

NLCHP, *supra* note 47, at 3 (discussing the National Law Center on Homelessness & Poverty’s interpretation of the “awaiting foster care placement” provision, stating,

McKinney-Vento . . . appl[ies] to children and youth ‘who lack a fixed, regular, and adequate nighttime residence.’ That general definition, combined with the specific inclusion of children ‘awaiting foster care placement,’ must be interpreted as applying . . . McKinney-Vento . . . to children in any interim placement.

<sup>99</sup> NLCHP, *supra* note 47, at 3.

<sup>100</sup> The terms “longer-term” and interim placement are not defined by state or federal statute or regulation. However, they are concepts contemplated by Connecticut, Massachusetts, and Tennessee in their interpretations of the “awaiting foster care placement.”



American Bar Association (“ABA”) suggests that longer-term placements<sup>101</sup> include long-term foster placements, pre-adoptive foster homes,<sup>102</sup> long-term kinship care,<sup>103</sup> group homes,<sup>104</sup> and residential placements, if a determination has been made that the placement is appropriate and long-term.<sup>105</sup>

By contrast, *interim* foster care placements are not intended to be long-term. A social services agency would *not* expect a child to await permanency in an *interim* placement. Rather, a child is placed in an *interim* foster care placement only until a longer-term placement can be arranged. The ABA suggests that *interim* placements include shelters; emergency, short-term foster homes; group homes and residential placements that are not intended to be long-term; and evaluation centers or placements for the sole purpose of evaluation.<sup>106</sup> For the purpose of this Note, I distinguish between two types of *interim* foster care placements: 1) placements that are “very temporary, by design,” and 2) placements which are *not* “very temporary by design,” but are still not intended to be longer-term.<sup>107</sup>

## 2. The Two Types of Interim Placements

Placements that are “very temporary, by design,” are *very* short-term, intended to last only a matter of days. In their approaches to defining the “awaiting foster care placement” provision, Connecticut, Massachusetts, and Tennessee all include children in various “very temporary, by design,” placements within the “awaiting foster care placement” provision. In Connecticut, a shelter, a SAFE Home, and a Permanency Diagnostic Center are all “very temporary, by design.” Shelters, Hotline Homes, Bridge Homes, and diagnostic placements are “very temporary, by design,” placements in Massachusetts. Under the types of placements included under Tennessee’s interpretation of “awaiting foster care placement,” assessment beds and shelters are both “very temporary, by design.” Within the ABA’s list of interim placements, shelters and evaluation centers or placements for the sole purpose of evaluation, are “very temporary, by design.” Each of these *interim* placements is “very temporary, by design,” because the social service agency only intends to place children in these types of placements for a short number of days.

By contrast, there are placements that are *not* “very temporary, by design,”—

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<sup>101</sup> Note that the American Bar Association refers to such placements as “not interim,” as opposed to “longer-term.”

<sup>102</sup> See *supra* note 97 for the definition of pre-adoptive foster home.

<sup>103</sup> Kinship care refers to the full-time care and nurturing of a child by someone who is related to the child by family ties or by a significant prior relationship connection. Adoption.com, <http://glossary.adoption.com/kinship-care.html> (last visited Aug. 14, 2006).

<sup>104</sup> See *supra* note 97 for the definition of group home.

<sup>105</sup> ABA, *supra* note 17.

<sup>106</sup> *Id.*

<sup>107</sup> Note that this distinction is the author’s own and was not taken from another source.

meaning that they are placement types that are *usually* intended to last more than just a few days. However, sometimes such placements should also be considered *interim* placements because they are not intended to be longer-term. Take, for example, a foster home. A child is sometimes placed in a foster home with the expectation that the child will reside in that placement for a relatively longer period of time, for example, until permanency is achieved. In that case, a foster home *is* a longer-term placement. However, sometimes a child is placed in a foster care home only on a short-term, emergency basis until a different foster placement can be arranged. In that case, the child should be considered to be in an *interim* placement because the foster home is not intended to be longer-term. Rather, the social service agency, in this instance, intends the placement to be an *interim* placement while more appropriate longer-term accommodations are located.

In defining *interim* foster care placements, the ABA includes some placements that are *not* “very temporary, by design,” but should still be considered *interim* placements because they are not intended to be longer-term. Those *interim* placements include emergency, short-term, foster homes, and group homes and residential placements that are not intended to be long-term. All of these placement types are not “very temporary, by design,” placement types, but they should nonetheless be considered *interim* because they are not meant to be long-term.

Massachusetts and Tennessee, in their definitions of “awaiting foster care placement,” both include placement types that are not “very temporary, by design,” but should still be considered *interim* placements because they are not intended to be long-term. For example, Massachusetts’ officials explained that there could be a situation in which, due to limited resources, DSS places a child in a foster home, with the intention of removing that child from that placement as soon as another placement is free.<sup>108</sup> Massachusetts explains that a child in such a situation might be considered “awaiting foster care placement.” Similarly, Tennessee officials stated that children residing in foster homes that are anticipated or likely to be short-term in nature should be considered “awaiting foster care placement.”

### 3. Determining Whether a Child is in an Interim Placement

Determining whether a child is residing in an *interim* foster care placement, and is thus eligible for McKinney-Vento services, is concededly not always a simple task. First, a school district must identify, when possible, which placement types are *interim*. Second, the school district must determine which students are residing in *interim* placements. In making this determination, different steps should be taken depending on whether the *interim* placement is 1) “very temporary, by design,” or 2) *not* “very temporary, by design,” but still not intended to be long-term.

Placements that are “very temporary, by design,” can be detected rather easily

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<sup>108</sup> Mass. Letter, *supra* note 84.

because they are always supposed to last for a very short amount of time. Massachusetts provides an approach for identifying such placements. In Massachusetts, the state department of education asked the DSS for a list of placements that are always “very temporary, by design.”<sup>109</sup> DSS produced a list including shelters, Hotline Homes, Bridge Homes, and diagnostic placements.<sup>110</sup> This provided a bright-line rule<sup>111</sup> for Massachusetts: such placements are always *interim*, so children in such placements should always qualify for McKinney-Vento protections. Each local department of education should request a list of “very temporary, by design,” placements from their local social service agency. This will provide every district with a bright-line rule concerning *interim* placement types that are “very temporary, by design.”

While a bright-line rule can be established for identifying placements that are “very temporary, by design” it is more complicated to detect placements that are *not* “very temporary, by design” but should nonetheless be considered *interim* because they are not intended to be longer-term. Such placement types are sometimes intended to be longer-term and sometimes intended to be shorter-term, depending on the particular circumstances. Therefore, unlike the case with placements that are “very temporary, by design,” it would be impossible for the local social service agency to provide the school district with a list of such placements that should always be considered *interim*. Nonetheless, as explained below, the school district should still be able to identify children that are residing in placements that are *not* “very temporary, by design” but should nonetheless be considered *interim*.

The task of identifying children in both types of *interim* foster care placements should go to the liaison for homeless children and youth.<sup>112</sup> The liaison should be alerted when any child in an out-of-home placement attempts to enroll at a school within the liaison’s district. The liaison should then work to determine the intended duration of the child’s placement. The National Law Center on Homelessness & Poverty (“NLCHP”) offers some guidance on how a liaison could determine the intended duration of a placement.<sup>113</sup> The NLCHP advises that the social service agency and the child’s law guardian will usually know whether the child’s current placement is intended to be *interim*.<sup>114</sup> Therefore, the liaison should be able to obtain this information from departments of social services, local juvenile or family courts, court-appointed attorneys or

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> A bright-line rule is one that is very clear. BLACK’S LAW DICTIONARY 187 (7th ed. 1999).

<sup>112</sup> The duties of the local education liaison are listed in 42 U.S.C. § 11432(g)(6)(A) (2005) and include identifying children that are considered homeless, including those who are considered homeless because they are “awaiting foster care placement.”

<sup>113</sup> NLCHP, *supra* note 47, at 3.

<sup>114</sup> *Id.*

advocates, and other personnel involved in the child's case.<sup>115</sup> Reference to the child's permanency plan could also be informative.<sup>116</sup>

In conclusion, *interim* placements are not intended to be longer-term; rather, they are temporary placements intended to last only until a longer-term placement can be arranged. There are two types of *interim* placements: 1) placements that are "very temporary, by design," and 2) placements which are *not* "very temporary by design," but are still not intended to be longer-term. The local educational liaison for homeless children and youth should work to first identify children residing in either type of *interim* placement and, second, to make sure that such children are provided McKinney-Vento services.

*B. Reasons Why Children in Interim Foster Care Placements Should Be Included in the "Awaiting Foster Care Placement" Provision*

1. The Plain Meaning of McKinney-Vento

The plain meaning of McKinney-Vento suggests that children in interim foster care placements should be considered "awaiting foster care placement." McKinney-Vento defines, as homeless, children and youth "who lack a fixed, regular, and adequate nighttime residence."<sup>117</sup> The plain meaning of such terms suggests that children in interim foster care placements lack a fixed, regular and adequate nighttime residence. Fixed means "securely placed or fastened" and "recurring on the same date each year."<sup>118</sup> An interim foster care placement is not "fixed" because it is by no means "securely placed or fastened." Rather, such a placement is only intended to last until a longer-term placement can be arranged. Regular means "recurring, attending, or functioning at fixed or uniform intervals."<sup>119</sup> An interim foster care placement is not regular because it is only short-term and can, and is indeed expected, to change prior to permanency. Adequate means "sufficient for a particular requirement."<sup>120</sup> Foster care, in general, is intended to be a sufficient place for a child to await permanency. However, interim placements are inadequate because a child resides in such a placement only because an *adequate* placement—one in which she can await permanency—is not available.

The "fixed, regular, and adequate"<sup>121</sup> provision does not stand alone as the only text in McKinney-Vento, which suggests that children in interim foster care placements ought to be considered homeless for the purposes of the Act. The

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> 42 U.S.C. § 11434a(2)(A) (2005).

<sup>118</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 441 (10th ed. 1996).

<sup>119</sup> *Id.* at 985.

<sup>120</sup> *Id.* at 14.

<sup>121</sup> 42 U.S.C. § 11434a(2)(A) (2005).

“awaiting foster care placement” provision<sup>122</sup> also necessitates that McKinney-Vento apply to children in interim placements.<sup>123</sup> It is a well-established canon of construction that a statute cannot be interpreted in such a way as to render statutory language meaningless;<sup>124</sup> thus, some children must be included under the “awaiting foster care placement” provision. Although Congress was not clear about who should be included under this provision, it is difficult to imagine whom Congress envisioned reaping the benefits under the provision, if not children in interim foster care placements.

## 2. Public Policy

Homeless children and children in interim foster care placements face virtually identical barriers to school stability and access,<sup>125</sup> as both are victims of high residential mobility.<sup>126</sup> Due in large part to this mobility, both homeless children and children in interim foster care placements commonly suffer poor educational outcomes.<sup>127</sup> Public policy suggests that children in interim foster care placements

<sup>122</sup> 42 U.S.C. § 11434a(2)(B)(i) (2005).

<sup>123</sup> Woodward, *supra* note 15, at 2.

<sup>124</sup> NLCHP, *supra* note 47, at 2.

<sup>125</sup> *Id.*

<sup>126</sup> ABA, *supra* note 17. Sometimes the line between a child who is homeless—under the common meaning of the term—and a child who is awaiting foster care placement is blurred. In a growing number of cases, homelessness leads to involvement with the child welfare system and children’s entry into foster care. KATHY BARBELL & MADELYN FREUNDLICH, *FOSTER CARE TODAY 2001* at 10, *available at*,

<http://www.casey.org/NR/rdonlyres/89981DE1-D4B8-4136-82DD>

DD1C8FDEF7CE/129/casey\_foster\_care\_today.pdf#search=%22%22Foster%20Care%20Today%22%20%22Kathy%20Barbell%20%26%20Madelyn%22%22 (last visited Oct. 1, 2006). In 1988, homelessness was a factor in over 40% of placements into foster care in New Jersey and the sole precipitating cause in 18% of those placements. Often, children either are involuntarily removed from their parents’ custody or families voluntarily place their children after they have lost their homes and find that they have no other option. *Id.*

<sup>127</sup> Foster care statistics cited in this footnote refer to children in foster care, in general, as opposed to children in interim foster care placements. This is because available statistics regarding the educational outcomes of those in care do not distinguish between these two groups. However, children in interim foster care placements—as opposed to children in longer-term placements—are more likely to suffer educational detriments because they are more likely to experience multiple placement changes. When compared to non-foster care youth, foster children are more likely to have discipline problems and more likely to miss substantial amounts of school. Foster children have higher rates of grade retention, lower academic skills as measured by standardized tests, higher absentee and tardiness rates, and high dropout rates when compared to the population of children not in care. ABA, *supra* note 17. Twenty percent to 40% of foster children repeat one or more grades, and 30% to 96% are below grade level in reading or math. España & Fried, *supra* note 10, at 83. Of the more than 500,000 children in foster care, approximately 30% to 40% are receiving special education services. ABA, *supra* note 17.

The effect on educational outcomes for youth who have been in foster care is particularly poignant for older students. High school graduation rates for children in care vary between 20% and 63%. España & Fried, *supra* note 10, at 83. By contrast, 84% of children in the general population graduate from high school. *Id.* According to a 1997 study, children in foster care drop out of school at twice the rate of other children. NLCHP, *supra* note 47, at 4 n. 7. From a sample of former foster youth twelve to eighteen months after emancipation (aging out of the foster care system), 37% had not finished high school; 39% were unemployed; 27% of males and 10% of females had been incarcerated at least once; and 39% were receiving public assistance. Policies, Practices, and

should be considered “awaiting foster care placement” because of the similarities they share with the homeless, in terms of high mobility rates, and because such children can benefit from McKinney-Vento’s protections.<sup>128</sup> Children in interim foster care placements stand to benefit most from the transportation provision, which requires that a student be bussed to her or his school of origin, and the immediate enrollment provision, which allows children to enroll in school immediately, while documents typically required for enrollment are obtained.

*i. The Transportation Provision*

Arguably, the McKinney-Vento protection that would most greatly benefit children in interim foster care placements is the transportation provision.<sup>129</sup> When applied to children in interim foster care placements, the transportation provision would require the school district to bus a child to her school of origin—the school she attended before being placed in care—until she obtained either a long-term foster care placement or permanency.<sup>130</sup> The McKinney-Vento transportation provision is very important for children in interim foster care placements. Children stay in an interim placement for a short period of time, so a lot of academic distress

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Procedures Affecting the Education of Children Residing in Group Homes (2003), available at [http://www.csef-air.org/publications/related/grouphomes\\_417.pdf](http://www.csef-air.org/publications/related/grouphomes_417.pdf). One national study found that 46% of foster youth had not completed high school within two and a half to four years after exiting foster care at age eighteen. Woodward, *supra* note 15, at 1. In addition, only 15% of foster youth enroll in college preparatory classes, and an even lower percentage enroll in post-secondary education. *Id.* There is also a higher than average rate of homelessness and drug abuse amongst those who age out of the foster care system. Failure to meet the educational needs of children and youth in foster care comes at a serious cost. Studies have shown that foster children with unmet educational needs are at higher risk for homelessness, poverty, public assistance, and juvenile or adult court involvement. *Improving Education for Children in Foster Care with Disabilities*, Children’s Defense Fund [http://www.childrensdefense.org/childwelfare/adoption/improving\\_education.aspx](http://www.childrensdefense.org/childwelfare/adoption/improving_education.aspx) (last visited Aug. 14, 2006).

<sup>128</sup> In its letter, the Mass. departments provided policy reasons of their own:

Our experience has been that these students benefited enormously from the removal of enrollment barriers—residency requirements, academic records, immunization and other medical records—when they sought to attend school where they were temporarily residing. In addition, McKinney-Vento afforded the students the option to remain in their school of origin when it was in their best interest, which in the case of high school students prevents the loss of course credit toward graduation due to frequent moves. Students in state care or custody often need to be placed in “emergency, temporary, or transitional” living situations before the state is able to find the most appropriate and long-term placement for them. Without the protections afforded to all other homeless students through McKinney-Vento, educational havoc is created at a time of considerable family and personal upheaval.

Mass. Letter, *supra* note 84.

<sup>129</sup> In fact, the USDE’s McKinney-Vento Report to Congress for fiscal year 2000 cited lack of transportation as the number one barrier that homeless children and youth faced in attempting to enroll in and attend school regularly. Education for Homeless Children and Youth Program, *supra* note 52, at 19. However, entering foster care or changing foster care placements does not necessarily mean that school placement will also change. A change in school placement only occurs when the child is placed in a foster care placement in a different school district.

<sup>130</sup> If longer-term foster care or permanency were obtained in the middle of the school year, the transportation services would continue until the end of the academic year.

can be avoided if they are not required to change schools for that short period of time and instead are allowed to attend their school of origin.<sup>131</sup> Most children would not be able to attend their school of origin if transportation were not provided.

School mobility is often associated with poor educational outcomes.<sup>132</sup> Each time a child changes schools her educational program is disrupted, breaking instructional continuity.<sup>133</sup> The child must adapt to new rules,<sup>134</sup> unfamiliar teachers and classmates, and catch up with different curricula or lesson plans, making it difficult to acquire even the most basic academic skills.<sup>135</sup> With each school move, children are academically set back an average of four to six months.<sup>136</sup> Multiple changes in school placement during high school can significantly lower a student's chances for graduation.<sup>137</sup>

Additionally, multiple school transfers can affect foster children's ability to access services available to other children, such as special education services.<sup>138</sup> A student in an interim foster care placement may not stay in one school long enough for school personnel to fully identify her needs, evaluate her,<sup>139</sup> and place her in a

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<sup>131</sup> Many foster children experience multiple placements. A determination of whether these were interim or longer-term placements would be made following the guidelines discussed *infra*, § IV. Social service agencies frequently change the placements of foster youth mid-semester without considering the impact the move will have on the youth's education. Woodward, *supra* note 5, at 1. In the fiscal year of 1998, a significant number of children in foster care—almost a quarter of whom had been in care for more than three years—had experienced multiple placements: 21% had three or four placements, 8% had five or six placements; and 8% had seven or more placements. Barbell & Freundlich, *supra* note 126, at 7. The USDHHS reports that nearly one out of five children in foster care experience three or more placements within a twelve-month period of time. *Improving Education for Children*, *supra* note 127.

<sup>132</sup> Teicher, *supra* note 32. See also H.R. Rep. No. 106-1040 (2001), available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr1040&dbname=cp106&>. (“Nationwide, the lack of transportation is one of the most pervasive barriers to enrollment and success for homeless children and youth.”) España & Fried, *supra* note 10, at 84.

<sup>133</sup> The Educational Needs of Children in Foster Care: The Need for System Reform (Nov. 6, 1998), <http://www.advocatesforchildren.org/pubs/foster.doc>.

<sup>134</sup> Policies, Practices, and Procedures, *supra* note 127, at 11.

<sup>135</sup> Andrea B. Berkowitz, *Homeless Children Dream of College Too: The Struggle to Provide America's Homeless Youth With A Viable Education*, 31 HOFSTRA L. REV. 515, 519 (2002).

<sup>136</sup> Teicher, *supra* note 32 (discussing homeless children). One study shows that, by fourth grade, mobile students are an average of four months behind their classmates on standardized tests and, by sixth grade, are as much as one year behind. In another study, students who had changed schools at least six times between the first and twelfth grades were thirty-five percent more likely to fail a grade than students who did not move or had moved just a few times during the period. España & Fried, *supra* note 10, at 85.

<sup>137</sup> España & Fried, *supra* note 10, at 85. Researchers generally attribute multiple school placements as the cause for the high rate of school dropout among foster youth. NLCHP, *supra* note 47, at 4 n.7.

<sup>138</sup> España & Fried, *supra* note 10, at 85. For example, children who undergo transfers often are not evaluated for or do not access special school services such as special education programs or gifted and talented programs. *Id.*

<sup>139</sup> See A Guide to the Individualized Education Program, <http://www.ed.gov/parents/needs/speced/iepguide/index.html#Introduction> (last visited Aug. 14, 2006) (discussing the special education evaluation process).

special education or other appropriate program.<sup>140</sup> Multiple changes in school placements are also frustrating for children who want to participate in extracurricular school activities.<sup>141</sup> For example, a child may want to play on a high school sports team but may end up missing either all or part of the season because of a new placement.<sup>142</sup>

Many of these educational detriments could be avoided if children in interim foster care placements were allowed to continue attending their schools of origin and were bussed to those schools.<sup>143</sup> If children in interim foster care placements are extended the protections of the McKinney-Vento transportation provision, they can avoid educational detriments such as instructional discontinuity and not remaining at a school long enough to be tested for special education services.

### *ii. The Immediate-Enrollment-in-School Provision*

In some cases, children in interim foster care placements may wish to attend the school in their new neighborhood once they enter foster care or change foster care placements. There could be a variety of reasons, such as dissatisfaction with their school of origin or the convenience of attending a school closer to their new

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<sup>140</sup> Berkowitz, *supra* note 135, at 521. By the time teachers begin to identify and respond to specific academic deficits or strengths, the child may have moved to a different school. España & Fried, *supra* note 10, at 85.

<sup>141</sup> Berkowitz, *supra* note 135, at 521.

<sup>142</sup> *Id.*

<sup>143</sup> The school of origin provides a sense of belonging and an environment that supports the child's emotional and social growth. Berkowitz, *supra* note 135, at 519. Allowing children to remain in their home schools prevents gaps in learning that would otherwise exist due to differences in school curricula and teaching methods. *Id.* For children in foster care, positive relationships with supportive teachers, school-based counselors and classmates can offer a measure of protection from the disruption and uncertainty associated with out-of-home placement. STEVE CHRISTIAN, EDUCATING CHILDREN IN FOSTER CARE I, National Conference State Legislatures (Dec. 2003) <http://www.ncsl.org/programs/cyf/cpieducate.htm>. Maintaining school stability can be crucial, and is far preferable to changing schools several times within a short period of time. Woodward, *supra* note 15.

Another advantage to allowing children in interim foster care placements to attend their school of origin relates to the goal of reunification. Reunification refers to the returning of a foster child to her parent(s) or principal caretaker(s). Permanency and Reunification Trends in 25 States, <http://aspe.hhs.gov/hsp/fostercare-reunif01/chapter3.htm> (last visited Aug. 14, 2006). State administrators report that reunification is the primary goal for families in the child welfare system. *Id.* In the 2003 fiscal year, 48% of children in foster care had a case goal of reunification. AFCARS, *supra* note 98. (Other case goals included the following: live with relatives: 5%; adoption: 20%; long term foster care: 8%; emancipation: 6%; guardianship: 3%; and case plan goal not yet established: 10%. Of the estimated 263,000 children who exited foster care during the 2001 fiscal year: 57% were reunified, 18% were adopted, 13% went to live with a relative or guardian, 7% were emancipated, and 5% had other outcomes. Alternate outcomes include those being transferred to another agency and runaways.) Foster Care National Statistics (2003), <http://nccanch.acf.hhs.gov/pubs/factsheets/foster.cfm> (last visited Aug. 14, 2006).

Hence, when there is a goal of reunification for such a large percentage of the foster care population, it is logical to keep children in interim foster care placements in their schools of origin. The goal is to bring these children back home, and consequently back to their school of origin. If the children are never required to leave their school of origin in the first place, the transition back home will be smoother.



residence. Such children can benefit from the McKinney-Vento provision permitting immediate access to school, even in the absence of the usually required paperwork.

Child welfare agencies and school districts are notorious for failing to share information with each other.<sup>144</sup> This can result in children spending extended periods of time out of school, waiting for necessary education and medical records to arrive at the new school so they can enroll.<sup>145</sup> In one study, forty-two percent of the foster children surveyed indicated that they had experienced delays in school enrollment while in foster care.<sup>146</sup> Under McKinney-Vento's protections, failure of the students' paperwork to transfer from one school to the next—regardless of the reason—would not negatively impact children in interim placements, as they would be allowed to register for school even in the absence of the required paperwork.

*C. The Unavailing Arguments Against Affording Children in Interim Foster Care Placements the Protections of McKinney-Vento*<sup>147</sup>

One could argue that McKinney-Vento is under-funded and that adding children in interim foster care placements to the list of those benefiting from the Act

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<sup>144</sup> Woodward, *supra* note 15, at 1.

<sup>145</sup> *Id.* See España & Fried *supra* note 10, at 84. However, some problems resulting from changing school cannot be remedied by McKinney-Vento's automatic entry provision. Sometimes school records are lost, creating a myriad of problems. For example, when school changes occur, educational records do not always transfer in a complete or timely manner; meanwhile the child—although able to enroll in school under McKinney-Vento—is placed in inappropriate classes while waiting for the school to receive the records. Sometimes a child will move so often that his records are lost or misplaced, causing the child to lose credits or to repeat classes. In some cases, no one formally withdraws the child from the previous school, with the result that the child appears truant and his or her grades are lowered. *Id.*

<sup>146</sup> España & Fried *supra* note 10, at 84. The delay was often attributed to lost or misplaced school and immunization records. "Of those children, more than half said the delay resulted in nonattendance at school for anywhere from two to four weeks. Another study, administered over a ten-week period, showed that three out of thirty-one group-home children had waited more than twenty days before entering school, and that ten attended no school at all during the full ten-week study period." *Id.* at 84-85.

<sup>147</sup> Even if McKinney-Vento's protections are extended to children in interim foster care placements, bussing foster children to their schools of origin or allowing them to enroll in a new school without documentation will not solve all of their educational problems. Many of these young people are likely to have had academic difficulty before they entered the foster care system. The Educational Needs of Children in Foster Care, *supra* note 133. For example, children in foster care have been exposed to a range of experiences both prior to and during placement in care, including parental drug use during pregnancy, neglect, abuse, and separation from biological family members. ADVOCATES FOR CHILDREN, *supra* note 2, at 4. These experiences increase their chances of having developmental delays, weaker cognitive abilities, behavioral and emotional problems, and higher rates of absenteeism and tardiness—any or all of which contribute to poor academic performance and retention. *Id.* Additionally, foster children may miss class time due to their need to attend court hearings, counseling, or medical appointments related to abuse and neglect. They may have also suffered lengthy periods of distraction or inability to focus on school due to troubles at home that may predate child welfare and court system intervention. ABA, *supra* note 17. Furthermore, their experiences while in foster care often place them at risk of becoming frustrated and defeated, and of experiencing school failure. The Educational Needs of Children in Foster Care, *supra* note 133.

would impose too much of a financial burden on local school districts.<sup>148</sup> While many governmental programs are arguably under-funded, it does not excuse school districts from providing educational services to children in interim foster care placements. Further, whether or not monetary concerns are valid depends in part on whether one considers the short-term cost savings to districts or whether one looks at the long-term costs of having highly mobile students or students who miss school while waiting to enroll. There is no doubt that schools, in the short-term, would save money and time by excluding children in interim foster care placements from McKinney-Vento's protections. However, long-term consequences would overshadow these benefits, as a high rate of school mobility and students missing substantial amounts of school would result in students with lower academic achievement and poorer performing schools.

Another argument against allowing McKinney-Vento's protections to cover children in interim foster care placements is that it would be significantly more cumbersome for school districts to implement McKinney-Vento if they had to provide for these children in addition to children who are homeless under the parochial meaning of the term. Many school districts already encounter problems implementing McKinney-Vento.<sup>149</sup> Additionally—as discussed above—it is often

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<sup>148</sup> “[I]nadequate funding clearly impedes the effectiveness of McKinney[-Vento].” National Coalition for the Homeless, <http://www.nationalhomeless.org/publications/facts/McKinney.pdf> (last visited Aug. 14, 2006).

<sup>149</sup> See Teicher, *supra* note 32. (“Awareness of the law has been filtering down, but full implementation is slow in coming. Some schools have to keep retraining staff because of high turnover, while others ‘just don’t want these kids, and will try to avoid implementing the law[.]’ . . .”); Susan Saulny, *For Students Bouncing Between Shelters and City Schools, Support Seems Elusive*, N.Y. TIMES (Sept. 19, 2004) (“[T]he state [New York] is poorly administering . . . McKinney-Vento . . . New York State has largely ignored the law, failing to inform parents of their rights, or to collect data intended to indicate which districts were in compliance with the law. . . . [T]he city’s Department of Education had applied to serve only 8,872 homeless students last year, when thousands more were in the system.”); Berkowitz, *supra* note 135, at 516 (“[S]ixteen years after the implementation of the 1987 Act, reports say that most homeless children still do not attend school at all.”); Sheila O’Leary, *Focus: What’s Wrong with Education in America?*, 8 GEO. J. ON POVERTY L. & POL’Y 513, 515 (2001) (“Despite the significance of . . . McKinney-[Vento] in removing obstacles to school entry and retention, inadequate funding and states’ noncompliance with this legislation have prevented the statute from guaranteeing homeless children educational access, stability, and success. Advocates for the homeless have complained that the McKinney Act is vague and difficult to enforce. . . . Advocates for the homeless also argue that states have failed to comply with the requirements of the statute. Although most states have revised their laws and regulations regarding residency requirements to improve homeless children’s access to education, some local school systems fail to implement the McKinney Act and the State’s policies regarding homeless children’s education. According to the National Coalition for the Homeless, appropriations for Title 7 of the McKinney Act have not kept up with inflation or demand for services.”); Deborah M. Thompson, *Breaking the Cycle of Poverty: Models of Legal Advocacy to Implement the Educational Promise of the McKinney Act for Homeless Children and Youth*, 31 CREIGHTON L. REV. 1209, 1234 (1998) (“The basic provisions of the law are not being implemented. . . . To a great extent, the failure to implement the McKinney Act is due to lack of knowledge about the educational rights of homeless children and the responsibilities of state and local school systems.”); Andrew S. Hughes, *Education Lost: The Homeless Children’s Right to Education*, 30 SANTA CLARA L. REV. 829, 854 (1990) (“Congress provided [through McKinney-Vento] that the homeless youth will be educated in public schools and there are no exceptions to this Congressional mandate. However, there are no provisions for enforcement in states which fail to implement such a program.”).

difficult to determine which children are in interim foster care placements versus long-term foster care placements. Nonetheless, there are ways of making this determination; after all, liaisons for homeless children and youth are hired for the sole purpose of identifying homeless children in their districts and making sure that they receive the services that they are guaranteed under McKinney-Vento. In short, the fact that a federal program is difficult to execute is no excuse for failing to implement the law in its entirety.

Some may contend that individual state legislation is the key to solving the educational dilemmas facing foster youth. Despite many states' laudable efforts at providing educational protections to foster children,<sup>150</sup> reaching these children through McKinney-Vento is still preferable for several reasons. First, providing children in interim foster care placements with protections through McKinney-Vento as opposed to through state legislation will reach more youth. Since McKinney-Vento is federal legislation, it must be followed by all of the states that choose to accept its funding. State legislation, of course, applies only to the individual state and states do not have any obligation to provide McKinney-Vento type protections to children in interim foster care placements. Second, there is funding attached<sup>151</sup> to McKinney-Vento, whereas there may not necessarily be funding for state legislation. Third, McKinney-Vento is already in place. Advocates wishing to afford McKinney-Vento-type benefits to children in interim foster care placements need not lobby their state legislators for such legislation. The "awaiting foster care placement" provision allows them to extend McKinney-Vento protections to these children already. Lastly, despite the protections afforded by some state legislation, most does not go as far as McKinney-Vento in providing educational protections to children in foster care. This is particularly evident with the transportation provision. Some states require that foster children be permitted to attend their schools of origin. However, few states require that students be

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<sup>150</sup> Many states are passing legislation that extends the protections of McKinney-Vento to some children in the foster care population. For example, Delaware passed Delaware House Bill 279. House Bill 279 requires that all youth in foster care be considered eligible for services under McKinney-Vento Act. The Bill states,

For the purpose of this Section and provisions of the McKinney-Vento Homeless Education Assistance Improvement Act, the words 'awaiting foster care placement' include all children in foster care" and "children in the care and custody of the Department of Services for Children, Youth and Their Families who are in foster care shall attend school in accordance with [ ] McKinney-Vento . . .

House of Representatives 143<sup>rd</sup> General Assembly, House Bill No. 279: An Act to Amend Title 14 of the Delaware Code relating to public school attendance of foster children, *available at* [http://www.legis.state.de.us/LIS/lis143.nsf/vwLegislation/HB+279/\\$file/2771430051.doc?open](http://www.legis.state.de.us/LIS/lis143.nsf/vwLegislation/HB+279/$file/2771430051.doc?open).

Additionally, in 2003 California passed Assembly Bill 490 ("AB 490"), extending most of the rights and protections afforded to homeless youth under McKinney-Vento to foster youth under California state law. Woodward, *supra* note 15, at 3. AB 490 allows foster youth to attend their schools of origin when a change in placement occurs and it provides for immediate enrollment in the new school when a transfer is necessary. CHRISTIAN, *supra* note 143. Such legislation is beyond the scope of this Note.

<sup>151</sup> McKinney-Vento funding is often criticized as inadequate ("[I]nadequate funding clearly impedes the effectiveness of [ ] McKinney [-Vento].") National Coalition for the Homeless, <http://www.nationalhomeless.org/publications/facts/McKinney.pdf>.

provided transportation to those schools of origin. As a result, many children are not able to take advantage of the right to attend their school of origin. Foster parents often have multiple foster children and cannot physically transport their foster children to different schools. This means that while some progressive states extend the right to attend their school of origin to children in care, many simply cannot exercise this right because they lack adequate transportation. Thus, McKinney-Vento is particularly vital because it forces school districts to provide children with transportation to their school of origin.

#### CONCLUSION

This Note opened with a discussion of siblings Eric and Joanna who, during six years in foster care, experienced countless foster care placements.<sup>152</sup> Had these young people been afforded the protections of McKinney-Vento, they could have stayed at their school of origin and received transportation to and from that school. If they decided to attend a new school, they would have been granted immediate admission. Youth in foster care will likely always encounter obstacles during their quest for an education, however extending McKinney-Vento protections to children in interim foster care placements would give children like Eric and Joanna the opportunity to counter the many educational obstacles facing children in foster care. The USDE should issue regulations mandating that children in interim foster care placements be considered homeless under the “awaiting foster care placement” provision and thus be eligible for the protections of McKinney-Vento.

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<sup>152</sup> ADVOCATES FOR CHILDREN, *supra* note 2, at 4. Due to the high number of placements that they experienced, it is possible that at least some of these placements could be characterized as interim.

